

- (3) What is the amount of compensation due?
- (4) Did the Administrative Law Judge exceed her jurisdiction by considering the independent medical examination report of Dr. Jones for purposes other than that set forth in K.S.A. 1996 Supp. 44-510e, therefore violating K.S.A. 44-519?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having considered the entire evidentiary record, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Claimant began her employment with the respondent in November 1996 as an actor/entertainer. She learned of the job opportunity through an advertisement in the newspaper. She auditioned twice with the respondent company, and was later offered a position over the telephone by Mr. Rick Hagg, the director of casting for respondent. This acceptance was made after several in-person and telephone contacts with Mr. Hagg. Claimant accepted the job offer over the telephone while she was at her home in Prairie Village, Kansas. Mr. Hagg then sent an employment contract to claimant's home in Prairie Village, Kansas, via Federal Express. At the time she received the contract, it had already been signed by Mr. Hagg. Claimant signed the contract. It was her understanding that was all she was required to do in order to accept the offered contract. The contract, which was stipulated into evidence by the parties, did contain a provision requiring that claimant submit to a drug screening and background check as a condition of employment with respondent. The contract stated in Section 9:

Should the Actor fail to meet standards deemed acceptable by SCKC, this agreement shall be considered canceled and terminated and the offer of employment shall be withdrawn with no liability whatsoever to SCKC.

Respondent contends this drug test was the last act necessary in order to create the contract. The parties stipulate that the drug screen test was performed at respondent's place of business in Missouri.

Claimant successfully passed the drug screening and began her work duties with respondent. On February 4, 1997, while going to the break room, claimant slipped and fell in an underground tunnel, injuring her left ankle and right elbow. She received treatment at the emergency room at North Kansas City Hospital, and was ultimately referred to Dr. Thomas Joseph McCormack, whom she saw on four occasions. She also received

physical therapy at Rehability, and was later treated by Dr. John Amick. Dr. McCormack released claimant from his care on March 31, 1997, with no permanent impairment.

Claimant contends she continued having difficulties with both the ankle and the elbow. She attempted to contact Dr. McCormack for a follow-up visit, but was advised by Dr. McCormack's office that she had been released from workers' compensation, and could not come back unless she paid for the visit herself. Claimant also contacted a nurse named Jeannie, whom she identified as being from workers' compensation, and was also told she was released from workers' compensation. It was then that claimant went to Dr. Amick for an examination and was told she was in need of further medical care.

When Dr. McCormack first examined claimant on February 5, 1997, he diagnosed a left ankle sprain and right elbow contusion. He immobilized claimant's arm and provided conservative care, including non-steroids and ice, for both the elbow and the ankle. He placed claimant's ankle in an immobilization Cam walker, and followed up with physical therapy.

On February 12, 1997, he saw claimant a second time and found her ankle to be considerably improved. She still had complaints of pain over the lateral elbow or the muscle around the elbow. He prescribed exercises for her ankle and continued physical therapy.

Dr. McCormack next saw claimant on March 10, 1997, at which time she displayed a nearly full range of motion in the elbow. He did, however, note some weakness in the elbow. Claimant had been walking in the Cam walker without much difficulty and displayed no residual signs in the ankle with the exception of some tenderness over the lateral aspect of the ankle. He ordered physical therapy to continue in an attempt to strengthen both the arm and the ankle.

On the next visit, March 31, 1997, he found claimant to have virtually no ankle complaints at that time, was wearing an ankle stirrup, and had improved dramatically. He found some mild tenderness over the proximal forearm, but that had also significantly improved since the initial examination. He released claimant from his care, and placed no functional impairment or permanent restrictions upon her. He indicated she should return on a PRN basis. He denies anyone in his office ever refused claimant treatment, and there was no notation in his records that claimant ever called regarding a follow-up examination. But, he did admit that that type of document would most likely not be created by his office. He found claimant to have no permanent impairment, for either the ankle or the elbow, based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition.

Claimant returned to Dr. McCormack on March 16, 1998, for follow up on the ankle and the elbow. At that time, she displayed only minor twinges in the left ankle. She did, however, have extreme tenderness over the lateral epicondyle of the elbow. This was not

in the elbow musculature but in the lateral epicondyle itself. The tenderness in the musculature of the elbow, which she had earlier displayed, was not present at the time of this examination. He diagnosed claimant with right lateral epicondylitis. His original diagnosis included contusion of the elbow. Epicondylitis is inflammation of the epicondyle, which is not the same. He felt claimant's original symptoms from the fall had resolved and she had developed a separate epicondylitis condition, which was not present in 1997. He opined that the 1998 findings were not related to the accident suffered in 1997, as it was in a different area of the elbow. He did note that claimant was playing the guitar during her employment, and opined that that may be contributing to claimant's lateral epicondylitis.

Dr. McCormack agreed that epicondylitis can be caused by trauma. He, however, went on to state that claimant's epicondylitis was not caused by the 1997 trauma, because in 1997 she complained of pain primarily in the proximal forearm musculature. Her original pain was not in the lateral epicondyle, or else he would have noted it and treated it differently. He also stated that claimant's epicondylitis would not have developed as a result of the bruising suffered in the fall.

Dr. McCormack agreed, on cross-examination, that the reports from Rehability, including the physical examination notes, indicated that, at the time of claimant's release, she was still having problems. He recommended that claimant should limit her activities, including stopping playing the guitar, in order to allow the elbow time to heal.

Claimant was referred by the Administrative Law Judge to Dr. Lowry Jones, Jr., an orthopedic surgeon, for an independent medical examination. Dr. Jones examined claimant on December 10, 1997. His report of December 10, 1997, indicates that he was examining claimant for the purpose of evaluating and determining impairment ratings regarding a work-related accident suffered on February 4, 1997. That is the only information in Dr. Jones' report dealing with the cause of claimant's ongoing conditions. He did diagnose claimant with an inversion injury to her left ankle and a traumatic injury to the right elbow with positive effusion, suggesting moderate to severe soft tissue injury. He rated claimant at 5 percent impairment at the level of the ankle and 12 to 15 percent impairment at the level of the elbow, consistent with both lateral epicondylitis and radial nerve impingement. Claimant was awarded a 10 percent permanent partial impairment to the body as a whole based upon the independent medical examination report of Dr. Lowry Jones, Jr.

CONCLUSIONS OF LAW

The Appeals Board finds that the Kansas Workers Compensation Act does apply to this injury. K.S.A. 44-506 allows that the Workers Compensation Act shall apply to injuries sustained outside the state, wherein (1) the principal place of employment is within the state, or (2) the contract of employment was made within the state, unless the contract otherwise specifically provides.

The parties acknowledge that respondent's principal place of business was in Missouri and would not invoke K.S.A. 44-506. However, claimant contends, and the Appeals Board agrees, that the contract of employment was created in the state of Kansas. Claimant's acceptance verbally, over the telephone, occurred while claimant was in her home at Prairie Village, Kansas. The contract provided to claimant, already signed by respondent's representative, came to her home in Prairie Village, Kansas. Claimant signed that contract in Kansas, which caused a valid contract to be completed at that time. Kansas law states that a contract is considered made when and where the last act necessary for its formation is done. See Neumer v. Yellow Freight System, Inc., 220 Kan. 607, 556 P.2d 202 (1976). The Appeals Board has had the opportunity to consider several instances where making a contract and invoking the jurisdiction of the Kansas Workers Compensation Act were at issue. In Stewart v. Serv Tech and National Union Fire Insurance Company of New York, Docket No. 222,290 (March 1998), respondent called claimant at her personal residence in Kansas City, Kansas, and offered claimant a job, which she accepted. The Board found the employment contract was created in Kansas and the Kansas Workers Compensation Act applied. Likewise, in Becker v. Gilbert Central Corporation and Aetna Casualty and Surety Company, Docket No. 172,229 (January 1997), the Act was found to apply to a Nebraska accident because the last act necessary to complete the employment contract was claimant's acceptance of the final offer while speaking over the telephone from her home in Wamego, Kansas.

Respondent contends the last act necessary in this instance was the drug screening which occurred in Missouri. However, Section 9 of the contract of employment, which was stipulated into evidence by the parties, states that, should the actor fail to meet the standards deemed acceptable, "this agreement shall be considered canceled and terminated and the offer of employment shall be withdrawn with no liability whatsoever to SCKC."

This clause indicates that a contract was in existence at the time the drug screening occurred. Failure to pass the drug screening would cause the contract to be canceled and terminated. But a valid contract of employment was created prior to the drug screening, thus invoking the jurisdiction of the Kansas Workers Compensation Act.

The Appeals Board will consider together the nature and extent of injury, the amount of compensation due, and the admissibility of the report of Dr. Lowry Jones, Jr., as the facts and legalities of these questions are intertwined.

Claimant received medical treatment through Dr. McCormack as the authorized treating physician, seeing Dr. McCormack several times in 1997. The final examination in March 1998 occurred as a result of claimant's ongoing complaints to both the elbow and the ankle. Dr. McCormack found no permanent impairment resulting from claimant's injuries suffered on February 4, 1997. He felt the ankle had healed sufficiently to not justify a permanent impairment. He felt the condition diagnosed in claimant in 1998 to her elbow

was different than that diagnosed in 1997. He opined the location of the symptoms had changed from the elbow musculature to the lateral epicondyle, and he did not believe that claimant's ongoing symptoms were related to the initial injury. He, instead, opined that claimant's symptoms may be related to her guitar playing, which would be a new and distinct injury, separate from the injury of February 1997.

Dr. Jones, the independent medical examiner, was asked to examine claimant for the purpose of evaluating what impairment may have resulted from claimant's work-related injury of February 4, 1997. Respondent contends Dr. Jones' opinion contains a causation opinion. However, it appears, from the opening line of the December 10, 1997, report, that Dr. Jones was proceeding on the assumption that he was to rate claimant regarding the work-related accident and nothing more. Therefore, it appears that whatever rating Dr. Jones placed in the report would be for the work-related accident rather than for some separate and distinct incident.

Dr. Jones found claimant to have suffered a 5 percent impairment to the ankle and a 10 to 12 percent impairment to the elbow. The Administrative Law Judge adopted the findings of Dr. Jones and found claimant had sustained a 10 percent whole body impairment as a result of the February 4, 1997, slip and fall. The Appeals Board agrees with the findings of the Administrative Law Judge, and grants claimant a 10 percent permanent partial impairment to the body as a whole as a result of the injuries suffered on February 4, 1997.

Respondent's objection to the admissibility of Dr. Jones' report fails, in part, due to the logic of the Kansas Court of Appeals in McKinney v. General Motors Corp., 22 Kan. App. 2d 768, 921 P.2d 257 (1996). In McKinney, the Court was asked to consider whether K.S.A. 44-519 prohibits the admissibility of reports submitted under K.S.A. 1996 Supp. 44-510e(a) which allows the administrative law judge to appoint a neutral health care provider to evaluate claimant and prepare a report regarding claimant's functional disability. K.S.A. 1996 Supp. 44-510e mandates that a referral, under that statute, resulting in a report, "shall be considered by the administrative law judge in making the final determination."

In this instance, the Administrative Law Judge specifically directed the independent medical examining doctor to evaluate claimant's impairment ratings resulting from the February 4, 1997, accident. That appears to be exactly what Dr. Jones did, and the report is considered appropriate evidence for the purpose of determining claimant's functional impairment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Julie A. N. Sample dated July 10, 1998, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of March 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the opinion of the majority in that the report of Dr. Jones should not be allowed into evidence, as it contravenes K.S.A. 44-519. K.S.A. 44-519 specifically limits the admissibility of certain medical records and, in particular, the reports of health care providers not supported by the testimony of such health care provider. There are certain exceptions to this rule, specifically K.S.A. 1996 Supp. 44-510e and K.S.A. 44-516. However, in this instance, the majority opinion uses Dr. Jones' report to support its causation finding, rather than simply for a functional impairment.

In addition, Dr. McCormack, the authorized treating physician, had the opportunity to see claimant on several occasions, over a significant period of time. He saw claimant both at the time of the 1997 injury and later in March 1998 when claimant's symptoms appeared to worsen and migrate. Dr. McCormack is the only medical expert who can state, within a reasonable degree of medical certainty, whether there is a connection between claimant's symptoms in 1998 and those displayed in 1997. Dr. McCormack made it clear that claimant's condition in 1998 was different than that diagnosed and treated in 1997. Dr. Jones' report makes no reference to what may or may not have caused claimant's condition for which he examined her in December 1997. While there is a vague

inference to causation at the beginning of Dr. Jones' December 10, 1997, report, that is speculative at best.

This Board member would find that the medical report of Dr. Jones should be excluded from evidence, pursuant to K.S.A. 44-519, or at the very least limited to a functional impairment opinion, and the medical report of the treating physician, Dr. McCormack, should be adopted regarding causation, and claimant should be denied any permanent award in this matter.

BOARD MEMBER

c: Mark E. Kelly, Liberty, MO
John David Jurcyk, Lenexa, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director